IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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| PROJECT VERITAS ACTION FUND,<br>Plaintiff<br>-VS-<br>DANIEL F. CONLEY, in His Official Capacity as Suffolk County District Attorney,<br>Defendant | CA No. 16-10462-PBS<br>Pages 1 - 78 |
| -and-<br>K. ERIC MARTIN, et al,<br>Plaintiffs<br>-VS-<br>WILLIAM B. EVANS in his Official Capacity as Police Commissioner for the City of Boston, et al,<br>Defendants | Civil No. 16-11362-PBS |

**MOTION HEARING**

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES CHIEF DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
July 19, 2018, 9:20 a.m.

LEE A. MARZILLI
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A P P E A R A N C E S:

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P R O C E E D I N G S

THE CLERK: Court calls Civil Action 16-10462, Project Veritas v. Dan Conley and Martin v. Evans. Could counsel please identify themselves.

MS. ROSSMAN: Good morning, your Honor. Jesse Rossman at the ACLU on behalf of Mr. Martin and Mr. Perez.

MR. DALSEN: Good morning, your Honor. William Dalsen, Proskauer Rose, also on behalf of Mr. Martin and Mr. Perez.

MR. McGARRY: Good morning, your Honor. Matthew McGarry on behalf of Commissioner Evans.

MR. HASKELL: Good morning. AAG Eric Haskell representing District Attorney Dan Conley in both matters.

MR. LANDRY: Good morning. Assistant Attorney General Matthew Landry representing DA Conley.

MR. BARR: Good morning, your Honor. Benjamin Barr representing Project Veritas Action Fund, along with me Greg Cote.

THE COURT: Okay. All right, there we go.

THE CLERK: You can all be seated.

THE COURT: So we're here today on both sets of motions. I don't know if you've worked out between you who should go first, which case.

MS. ROSSMAN: We have not, your Honor. At the Court's pleasure, we're happy to do whatever order.

THE COURT: Let's start with Martin then.

MS. ROSSMAN: All right. Good morning, your Honor.

THE COURT: Now, there's a little bit of a problem. Because you're so tall, I may not see the attorneys behind you, so I'm trying to -- maybe just in case you -- all right, are you okay now? All right, there we go. I can see now everybody. I can see everybody. Okay, go ahead.

MS. ROSSMAN: This Court already held, your Honor, that if discovery bore out the allegations in the complaint, plaintiffs should win; and the undisputed record now confirms that these are the right defendants, these are the right plaintiffs, and the plaintiffs should win on the merits of their claim. Unless the Court has any specific questions to ask at the start, I would like to walk through each of those elements in turn.

THE COURT: Sure, go ahead.

MS. ROSSMAN: With respect to the defendants, your Honor, there is no dispute that District Attorney Conley is properly before the Court on this matter. The question is whether or not Defendant Evans is properly here under *Monell*. Again, he's being sued in his official capacity, so it is as though it is a municipal claim against the City of Boston.

And the key question, of course, in municipal liability is whether or not the municipality has made a conscious choice that has caused a constitutional violation;

and this Court already held in its decision denying the motion to dismiss that it would join the weight of appellate authority on this issue to find that there is such a conscious choice --

THE COURT: No. I think what I said is, I'd let it go to the next stage to see, you know, what the evidence was on this point. So fair enough, the majority of the cases allow that conscious-choice approach. That said, you know, I was just letting it go to Stage B, which is, you know, motion for summary judgment.

MS. ROSSMAN: Absolutely, your Honor, and during discovery we ended up determining, and the undisputed record puts forth, that there is record evidence, undisputed record evidence that supports the two things that are important with respect to finding a conscious choice in cases like these. It is undisputed that Section 99 is an authorizing and not a mandatory statute. The Boston Police Department is not mandated to have to enforce Section 99 in this manner. So the question really turns --

THE COURT: Are there any statutes that are mandatory? Aren't they all worded that way?

MS. ROSSMAN: Not exactly, your Honor, in fact. So if we look to other circuits, *Vives*, for example, in setting forth this test, it cited to the New York State Agricultural and Markets Law, and there it said a constable or a police officer must issue an appearance ticket or arrest. And similarly the

Seventh Circuit in *Snyder* was dealing with a statute that had to do with voter registration, and it held that -- the statute at issue was, "The county voter registration officer shall remove the individual off of the official list," and that's not the language that we have here in Section 99, which certainly sets forth what violates the statute and what the punishment for the statute will be; but it doesn't say that a police officer shall arrest someone or shall seek a criminal complaint for that particular violation.

THE COURT: I do think it's true -- we did some research on this -- that *Monell* would apply when only injunctive relief is requested.

MS. ROSSMAN: That is correct, your Honor.

THE COURT: So it's not just a damages issue. I think that garnered all members of the Supreme Court, so --

MS. ROSSMAN: It did. Initially the Ninth Circuit was going the other way, but the Supreme Court, as it sometimes does, overturned the Ninth Circuit.

THE COURT: So would a remedy against the District Attorney provide you full relief?

MS. ROSSMAN: Not exactly, your Honor, because, of course, here the plaintiffs are seeking both declaratory relief and injunctive relief against both the prosecution and arrest under the unconstitutional application of Section 99 to the secret recording of police officers performing their duties in

public.

THE COURT: So what have other courts done if -- Justice Breyer asked in his majority opinion -- in fact, not majority, his unanimous opinion, and no one has shown me a situation where you need to find -- get injunctive relief against a city where you involve a statewide policy or something like that. So what would be another avenue for relief if your clients wanted a declaratory judgment or injunctive relief and I found there was no conscious choice? Is there another avenue for relief from arrest?

MS. ROSSMAN: Not that I'm aware of, your Honor. Of course, from the declaratory judgment piece, we're seeking relief both with Defendant Conley and Defendant Evans.

THE COURT: Would *Monell* stop a declaratory judgment?

MS. ROSSMAN: No, your Honor.

THE COURT: How do we know that?

MS. ROSSMAN: There's been no -- first of all, it would be the affirmative burden of the District Attorney to raise a *Monell* defense, and also *Monell* defense --

THE COURT: No, not *Monell*. I meant if -- I understand your point, Conley is one piece of it. But you're saying, well, that's not enough because someone could still be arrested, which is an unpleasant experience, to say the least. So could I do a declaratory judgment against Commissioner Evans under *Monell* if I found there was no conscious choice?

MS. ROSSMAN: Well, the declaratory judgment that the plaintiffs are seeking here, your Honor, is a statement that the application of Section 99 to the secret recording of police officers performing their duties in public is unconstitutional, and that would apply, period. So the declaratory judgment would certainly be in place regardless of whether or not Evans was a defendant in this case.

THE COURT: So, I mean, at least I have no reason to believe he wouldn't follow the law. So would that be appropriate relief?

MS. ROSSMAN: It is certainly a form of relief, your Honor, and it's something that the plaintiffs -- you know, the declaratory relief in stating or confirming that the application of Section 99 is unconstitutional as applied to secret recording of police officers obviously is a big piece of what the plaintiffs are seeking here. I think the reason why it's an important --

THE COURT: Does he stay in technically as a defendant if it's just a declaratory judgment?

MS. ROSSMAN: I believe it turns, your Honor, on this Court's determination of the *Monell* issue. I don't think --

THE COURT: So there's no way essentially around that issue?

MS. ROSSMAN: My understanding, your Honor, especially given what the Supreme Court has now said with respect to

*Monell* liability, is it applies to all forms of relief, whether it is equitable or damages, and so Defendant Evans is either in or out with respect to all of the relief. But of course, as your Honor just mentioned, the declaratory judgment would apply throughout the state. It wouldn't simply be limited to Boston, let alone just to Defendant Conley, so, of course, that would apply regardless of whether Defendant Evans was named as a defendant.

THE COURT: And then of course I'm assuming this case will go up on appeal one way or another so the First Circuit can take a look at these very complicated and difficult issues. So, anyway, I'm sorry, I interrupted.

MS. ROSSMAN: No problem, your Honor.

Perhaps I'd like to, if it's useful, to at least describe some of this evidence that was produced during discovery that we believe confirms that that conscious choice was made by Defendant Evans to satisfy that standard for *Monell* liability.

THE COURT: All right.

MS. ROSSMAN: There's really a double choice that we're talking about here. It's not simply the choice to train officers on Section 99, although that is apparent. It is also the choice to train officers exclusively on the application of Section 99 to secret recording of police officers who are performing their duties in public.

Now, we know from the undisputed record that resources in terms of training and timing are limited. I would imagine that's always true with respect to academies, but we know with respect to the Boston Police Academy, there have only been 22 training bulletins over the past three years, 28 videos that were produced since 2009. And with respect to the criminal instruction for recruits, they only get about 50 to 60 hours, and their book only focuses on approximately 150 sections out of the thousands of crimes that there exist in Massachusetts.

And what Defendant Evans suggests, your Honor, is that this training is focused on training officers that they cannot arrest someone for openly recording a police officer; and this might be a different case if that were true, but that's not what the contents of the record bear out. You'd anticipate that if the training was focused on training officers not to arrest someone for openly recording, it would state exactly that. It would perhaps provide an example of where it would be improper to arrest someone, and it would perhaps provide case law to that effect, citing and describing *Glik* and *Gericke,* and in fact that's exactly what the MPTC training documents do. But the Boston Police Department uses all of the tools at its disposal to go one step further, and that is to continuously tell its police officers that they can, they do have a right of arrest under Section 99 when someone secretly records, and then they provide explicit examples that exclusively focus on the

secret recording of police officers performing their duties in public. So, for example, that wiretap video that's discussed in the record, the first example is someone who's openly recording a police officer. The second example goes on to describe someone who secretly recorded a police officer, and the wiretap video informs officers they have a right to seek charges against this individual, and in fact this behavior is exactly the behavior that Section 99 was meant to prohibit. There's no discussion of *Glik* in the video, there's no discussion of *Gericke* in the video, and there's no example provided of any other kind of violation of Section 99 except for secretly recording of police officers, even though the record shows that the department can, and in the past has, changed and updated its videos when it wanted to provide additional information. And that pattern, your Honor, is reflected both in the training bulletin as well as the criminal law book. Again, there is a statement that you can't arrest someone for openly recording. That is undisputed. But both the training bulletin and that chapter in the criminal law book go on to provide examples of what violates Section 99, and the only examples they provide are of secretly recording a police officer performing their duties in public. Again, there's no discussion of *Glik*. There's no discussion of *Gericke*. There's no example provided of how else someone could violate Section 99; for example, by recording a civilian either in a

private conversation or even in a conversation with a police officer. It's that sole focus of the application of Section 99 that we see repeated in all of these tools that the department has at its disposal, and that's exactly the kind of choice that *Vives* explains is meant to trigger a *Monell* liability. *Vives* actually directly speaks to training materials, and says that when you provide examples of what violates a statute, that's putting meat on the bones of the statute, and that is sufficient to establish a policy that triggers *Monell* liability. And *Vives* held that wasn't conclusive in that case at the motion to dismiss phase because there hadn't been discovery about whether there were other kinds of training documents or how those training documents were used. But here we now know from discovery that every single recruit used the video and reads the criminal law statute on Section 99 to learn what violates that statute. And we know that there are not other documents that the Boston Police Department is creating that provides an alternative application of Section 99. So for those reasons, it's now undisputed on the record that under *Vives*, there is that conscious choice.

THE COURT: All right. It does occur to me, though, that we should probably get moving on to the -- are you planning on doing all the issues?

MS. ROSSMAN: I'm happy to, if it makes more sense to break things up, your Honor, I'm happy to do that.

THE COURT: Maybe you should just do your whole argument, and then we'll turn to opposing counsel. And then what I'll have to do is -- I have till 11:00, but my guess is we'll have a lot of discussion, so why don't you -- how long do you think you'll need all together?

MS. ROSSMAN: I would like to make sure that I save time for rebuttal, so I can tailor to that, your Honor. How long, I'm sorry, to --

THE COURT: To present?

MS. ROSSMAN: I think it would probably be ten more minutes, your Honor.

THE COURT: Fine. Oh, perfect, okay.

MS. ROSSMAN: All right, so turning to the defendants' justiciability, your Honor, and I'd like to address those in turn because the First Circuit has made clear that when you're looking at pre-enforcement cases, both ripeness and standing turn on similar issues. The defendants' arguments both boil down to an assertion that the plaintiffs would need to subject themselves to arrest in order to have a justiciable claim here; and, of course, as *Babbitt* and *Steffel* and numerous other Supreme Court and First Circuit cases make clear, that's simply not the case. And instead, when you're talking about pre-enforcement standing, the cases turn on whether there's a credible threat of enforcement and there is an intent to engage in that kind of conduct. And while that standard is not

nonexistent, it is also, as this Court already noted, not high, and the undisputed record now confirms that the plaintiffs have satisfied that standard.

The most on point case, your Honor, for this is of course the Seventh Circuit's *Alvarez* decision, and there the court pointed to three things which it said satisfied justiciability and said that nothing further was required for pre-enforcement standing. So there was an attempt to engage in the prohibited conduct, which there was a recording of police officers; that that conduct was prohibited by the statute; and the plaintiffs faced a credible threat of prosecution if they engaged in that conduct.

And plaintiffs here have provided that and more. It is undisputed that they want to secretly record police officers performing their duties in public without fear of arrest and prosecution, and that's at the Statement of Undisputed Material Facts 9 and 26. The plaintiffs are not required to state that they have a present intent to engage in this conduct right now while it's illegal. That would, of course, undercut the entire grounds of the chilling --

THE COURT: That's what you want in this injunction, police officers performing their duties in public? Is that the injunction you want?

MS. ROSSMAN: That is correct, your Honor, and I'm happy to take a moment either if it makes sense now to talk

about the remedies because, I want to make sure I'm clear about what that means, and I can do that now or I can do that at a later point if that --

THE COURT: So it's protests or car stops but not home searches?

MS. ROSSMAN: That's correct, your Honor. The definition of "public" that we're asserting here is streets and sidewalks and public parks and other places that are generally accessible to the public without permission or a key or other some kind of --

THE COURT: Restaurants?

MS. ROSSMAN: Yes, your Honor. And that is what the plaintiffs are requesting here, and I believe that that is in line with what the First Circuit -- I'm sorry.

THE COURT: So it's not just public forums. It's also publicly accessible?

MS. ROSSMAN: To the general public, your Honor. And that is the scope of what the plaintiffs are requesting here, and we think that that's supported by both *Glik* and *Yacobucci*. Of course, the *Glik* case, that did occur in the park, but the court continued to use words like "public spaces, public places," and also cited and relied heavily on the *Yacobucci* case from the First Circuit.

THE COURT: That was in a town hall.

MS. ROSSMAN: It was, but it wasn't a public hall. It

was within a building.

THE COURT: Right, a public building. That was my case, so --

MS. ROSSMAN: Yes. No, I am aware of that, your Honor. So I do think that that supports at least a broader understanding than simply traditional public forums. Of course, if this Court feels like the scope of that needs to be narrowed in terms of the definition, that would be the proper approach rather than denying relief outright; but in terms of the full form of relief that the plaintiffs are speaking to in terms of the place, it is those public spaces.

I'd also, it might make sense to speak briefly about remedy right now, your Honor, unless you prefer that I address --

THE COURT: Well, I actually find one of the hardest parts about this case is not necessarily the facts; it's doctrinally. Are we talking -- you've even switched. Is this as applied, or it's now morphed into a hybrid between as applied and facial? It's difficult to figure out which this is. And the Supreme Court has asked us not to rely on labels, so that's a little helpful here, so maybe I don't have to actually find out what the label is; but doctrinally it's actually fairly difficult because we're this a pre-enforcement situation.

MS. ROSSMAN: So, your Honor, we do believe that the

Court appropriately addressed this simply as applied in the earlier order, but I think --

THE COURT: I'm having second thoughts about whether it's facial or not.

MS. ROSSMAN: I think for the purposes of this case, the important piece is looking at *Reed* and *Showtime*. It doesn't actually matter with respect to the analysis of these issues, and that is because even if it's in that quasi-facial, quasi-as-applied realm -- and, as you noted, the Supreme Court both says that labels don't matter and also are not consistent necessarily in how they apply the labels -- but what they are consistent on is that when you have this quasi area, you still need to apply the relevant constitutional test for the question that's been placed before the court to the conduct that we're speaking about. And *Showtime* is very clear on this and I think is the reason why it's particularly relevant is, this doesn't transform the case automatically into an overbreadth claim. *Showtime*, similar to here, applied intermediate scrutiny to a quasi-facial, quasi-as-applied claim, and twice, at Footnotes 7 and 15, stated that even though it was this quasi-facial, quasi-as-applied claim, that was a separate claim than overbreadth, which there it chose not to address because it said it had been waived. So regardless of the label that this Court chooses to apply, or even if a label isn't actually applied to this claim, what is clear is that the level of

scrutiny that needs to be applied is that intermediate scrutiny test.

THE COURT: So I deliberately wanted Martin and Project Veritas to move on a similar track. So you're asking me to essentially rewrite the statute and to narrow it to only apply to police officers in public spaces. Let's leave for a second how you define that. So why just police officers? In other words, one could imagine similar arguments being raised for housing specialists or firefighters, city councillors, which is what it was in *Yacobucci*, I forget exactly --

MS. ROSSMAN: It was the Historic Commission.

THE COURT: It was the Historic Commission.

MS. ROSSMAN: A very contentious hearing.

THE COURT: I remember at the time thinking there's nothing as nasty as local politics, and this I think was over a stone wall, so --

MS. ROSSMAN: It's very important in Massachusetts --

THE COURT: But, you know, it involves all sorts of public officers. So what would your position be on making it broader than just police officers performing -- I forget how you said -- in public spaces?

MS. ROSSMAN: First, your Honor, just to be clear, we're asking -- I think this was what you said, but I want to make sure I'm hearing correctly -- we're asking that it not be applied to police officers performing their duties in public,

yes.

THE COURT: Yes, I may have misspoken. That's fine.

MS. ROSSMAN: The plaintiffs claim is focused exclusively on police officers, and the reason for that is, it has support both in the case law and in practical applications that police officers are treated differently as opposed to any other government official, let alone a private citizen. They alone are in our public streets and in our public spaces as arms of the state who are authorized to use force against civilians under certain circumstances --

THE COURT: Justice Marshall's analysis in the dissent in *Hyde* basically.

MS. ROSSMAN: Exactly, your Honor, and that was written in the early 2000s. I think that bears out even more several years later in terms of why it is important, when police officers have the right to detain individuals and arrest them, why they can and should be treated differently.

THE COURT: So you would be opposed to spreading it out beyond police officers?

MS. ROSSMAN: The plaintiffs are not taking a position on that, your Honor, but the reason why they have focused exclusively on police officers is because of that unique power and unique role that they have in the state; and the fact that the government, it's in everybody's interest, both the government and civilians, to insure that police officers in

particular are held accountable. They have their unique powers, and along with that comes unique responsibilities. We already know, of course, that they need to be willing to sort of accept significant burdens with respect to individuals exercising their First Amendment rights as a result of the role that they play in society, and one of those burdens is knowing that they can be secretly recorded when they're performing their duties in those public spaces.

THE COURT: Or perhaps it's just if you apply as applied, that's all you have standing to challenge at this point, if I went down that route.

MS. ROSSMAN: It's certainly the only thing that the plaintiffs are bringing here today, that's correct.

THE COURT: And then you're taking no position on the broader?

MS. ROSSMAN: That's correct. We're simply focusing on this narrow band of officers because we believe that is where it is especially clear that there are significant interests in holding police officers accountable and allowing individuals -- sometimes the only way to do that is to secretly record, either because individuals do not feel safe to openly record, or because, by its very nature, open recording can change the nature of an interaction such that you don't know how a police officer would react if they didn't know it was being documented, so it's particularly important in this realm.

THE COURT: All right.

MS. ROSSMAN: Again, your Honor, I think, just to be very clear about the remedy that we're seeking, unless you prefer that I go back to the justiciability first and address remedy at the conclusion.

THE COURT: I leave that up to you. I sort of have written on ripeness and standing. I'm not so eager to rewrite a treatise on it unless there's something new that came up. But I am quite confused, maybe is the word -- maybe that's because I'm getting it from the Supreme Court case law -- as to whether I think about this as facial or as applied because, frankly, your folks are only doing it in public spaces, like parades and protests and car stops. So when you tell me you want it in a restaurant, that pushes it more broadly than your folks have said they intended to go, your plaintiffs. So what would be the difference if I called it "as applied" versus "facial"? And what's the difference in the label in terms of -- it's still intermediate scrutiny, but you're so worried about overbreadth. Why?

MS. ROSSMAN: We're not worried about overbreadth. It just is a matter of the analysis, your Honor, and --

THE COURT: So what would be the difference in the analysis?

MS. ROSSMAN: Well, in overbreadth, there typically is a requirement you show there's absolutely no set of

circumstances, even under the First Amendment, which is a slightly more flexible overbreadth --

THE COURT: No set of circumstances that --

MS. ROSSMAN: That it could be constitutionally applied.

THE COURT: To anyone or just to the police officers?

MS. ROSSMAN: In an overbreadth challenge, your Honor, that was in a quasi-as-applied situation, I think it would be as applied to police officers.

THE COURT: So it's overbreadth in the quasi-as-applied?

MS. ROSSMAN: Right, but, again, *Showtime* makes clear that overbreadth applies when you're bringing an overbreadth challenge. If you're bringing --

THE COURT: And you're distinctly not bringing an overbreadth challenge?

MS. ROSSMAN: We're not bringing an overbreadth challenge, exactly.

THE COURT: So you don't want me to go there?

MS. ROSSMAN: No, and I think *Showtime* indicates that it would not be appropriate to do so when the plaintiffs have not brought that kind of challenge and instead to bring this intermediate challenge.

With respect to ripeness and standing, your Honor, I will just say that, as we've already set forth in our papers,

there's more than enough information that confirms that they do have standing and justiciability based on the standards that this Court already set forth. In addition to what they have already said that they want to do, they've also provided now in depositions and interrogatories more than a dozen examples of times when they've wanted to secretly record police officers performing their duties in the past, as well as dozens more where they have already openly recorded. So under *Alvarez*, they've gone above and beyond what would be required to establish pre-enforcement standing.

To your point about the restaurants, your Honor, plaintiffs actually did list in those examples of times when they, in their interrogatories, when they have wanted to secretly record police officers in the past, that one of the examples were times when they were in public spaces like stores and they saw police officers engaged in the public performance of their duties, and if they didn't feel safe openly recording there, that was a time they would want to secretly record. So I think with respect to putting forth those facts, they have done so. But, again, while that is the claim that the plaintiffs are seeking, I think the approach, if the Court wants to do anything with that and doesn't want to reach those issues, it would be to narrow the scope of the definition of "public places," obviously not to deny the declaratory relief outright.

THE COURT: Because there is a difference between a traditional public forum -- I think Project Veritas' best example is the government official standing on a soapbox in the public common -- as opposed to a restaurant where people are welcome, they're invitees, but they may not have the same set of expectations as you would in the Public Gardens. So I think that's part of the hard thing here, and prudentially how far does the relief go I'm struggling with.

MS. ROSSMAN: Well, I think in terms of the relief, your Honor, again, the public spaces, there are instances where we know where police officers are engaged in restaurants or in stores and are engaging in their official capacity there performing their duties in public, and those are the instances to which our plaintiffs speak, and why they would, you know, at the utmost would want to make sure that the relief we're granted would include those spaces. But of course, even relief which spoke to those traditional public spaces of streets and parks and sidewalks would be a vast improvement over the unconstitutional application that we have now, which is prohibiting a wide range of interactions with police officers who are performing their duties in public in an unconstitutional way. And so I --

THE COURT: Or maybe a constitutional way, and this would prove it up.

MS. ROSSMAN: Oh, I'm sorry. It's being applied in an

unconstitutional way. That was no judgment on how the police officers in any of those -- and I think that speaks to your Honor that the recordings could both hold police officers accountable or confirm that they are performing their duties lawfully. The plaintiffs agree that it can serve both of those purposes.

THE COURT: Okay. Well, thank you.

So I think, as I read the briefings, Mr. Conley -- well, let me just ask, do you want to make one set of arguments with respect to Mr. Conley and Mr. Evans, or are you going to do them separately?

MR. HASKELL: Oh, with respect to the two defendants?

THE COURT: Yes.

MR. HASKELL: We probably ought to do them separately.

THE COURT: Okay.

MR. HASKELL: But what I was going to suggest, your Honor --

THE COURT: You're Mr. Haskell, right?

MR. HASKELL: Yes, that's right.

THE COURT: And you're doing Mr. Conley?

MR. HASKELL: Yes.

THE COURT: Okay.

MR. HASKELL: And as I'm sure you saw from our papers --

THE COURT: Soon to be someone else.

MR. HASKELL: That's right, I suppose.

THE COURT: When is that election?

MR. HASKELL: The primary is in early September, and then the general is in November.

THE COURT: Okay.

MR. HASKELL: So what I was going to suggest is, I'm sure you saw from our papers that, you know, our arguments in the Martin case are probably 95 percent the same as they are in the Veritas case. You know, I'm happy in the interest of efficiency to address kind of everything all at once because they're basically the same argument, or we can proceed case by case if the Court prefers.

THE COURT: Then maybe what we should just do is just jump to Project -- other than the issue of whether or not there's a *Monell* issue, the same is true for Mr. Evans?

MR. McGARRY: Commissioner Evans is only in the Martin case.

THE COURT: Commissioner. Oh, okay. Okay, so maybe what we should do is defer on you, go to Commissioner Evans, that's right, and then we'll go to Project Veritas, and then you can do a big presentation, all right?

MR. HASKELL: I think that makes a lot of sense, your Honor. Thank you.

THE COURT: Okay, thank you.

MR. McGARRY: Thank you, your Honor. So, your Honor,

it's probably no surprise that I'd like to use my time to focus on the municipal liability issues in this case, and first and foremost, based on a concern that the Court raised, I wanted to put that to bed. Commissioner Evans and the City will of course abide by the law according to this Court's decisions, and so a remedy as to DA Conley would be a complete remedy as to plaintiffs in this case, in any case.

THE COURT: You work for the Attorney -- do you work for the AG?

MR. McGARRY: The City Law Department, your Honor.

THE COURT: The City Law Department. So what is the correct remedy? As Justice Breyer said, "And no one has shown me a situation where by denying injunctive relief, that would actually hurt civil rights." I'm paraphrasing. So let's suppose I agreed it wasn't *Monell* liability, dismissed you out, but issued a declaratory judgment action and injunctive relief with respect to Mr. Conley, does that mean you would stop arresting people?

MR. McGARRY: Yes.

THE COURT: And if not, at that point you would say there would be custom; is that right? In other words, at that point, if you chose to enforce a law that I've declared unconstitutional -- of course, the First Circuit overrides me and then the Supreme Court -- I'd love to see you all before the Supremes -- but let's just say that you're making the

public representation that if I rule adversely to the District Attorney, that Commissioner Evans would follow that ruling and send out a circular on that?

MR. McGARRY: I don't know whether he'd send out a circular or not --

THE COURT: I mean an announcement, nowadays maybe an e-blast, but, in any event, he would notify people?

MR. McGARRY: That's right, your Honor, and the City would abide by the ruling. So as I indicated and as the Court suggested, relief as to DA Conley in this case would be a complete relief as to plaintiffs. And I agree with Ms. Rossman's assessment that Commissioner Evans is either in or out of this case. If there's no *Monell* liability, there can be no real relief as to Commissioner Evans specifically, apart from a sort of more general injunction, which, as I indicated, the City would obey.

THE COURT: Yes, but what you'd hate to see is a -- for most people, even if the District Attorney didn't prosecute, whoever the District Attorney is doesn't prosecute, you'd hate to see the fear of being arrested. You'd want the police officers to understand that there's at least a constitutional shadow over an arrest while in public.

MR. McGARRY: That's exactly right, your Honor, and in fact that sort of dovetails with some of the issues that I'm going to talk about.

THE COURT: Okay, well, go ahead.

MR. McGARRY: Thank you, your Honor.

So, first, I'd just like to revisit the City's argument regarding the issue of municipal liability for mere enforcement of state laws, but on top of that, I also want to talk about three reasons why even under the alternative standard of *Vives*, there is no liability for Commissioner Evans in this case.

So as to sort of more broadly liability for municipalities for enforcing state laws, it's still the City's position that mere enforcement of the state law cannot be a city policy; and this bright line is important to protect the purpose of Section 1983, and that's that in the context of municipalities, that they can be held liable only for their own illegal acts and only where they're the moving force behind the deprivation of rights. And this case sort of highlights the risks of imposing such liability for merely enforcing state laws.

To accept plaintiff's argument is to radically expand *Monell*. The Supreme Court has warned about the dangers of defining municipal policy too broadly. The example that was in the *Tuttle* case and in the *Harris* case that's provided is "the policy of establishing a police force." Now, that's a conscious choice that the City makes, but to apply that would swallow the rule, and it's sort of just so here. Plaintiffs

explicitly are asking the Court to impose liability for the wiretap statute on the ground that the City doesn't train its officers on all possible state criminal statutes. So, in other words, plaintiffs are arguing that the City is liable for all laws that it doesn't ignore, all criminal laws that it doesn't ignore. And if the Court accepts this and finds the training materials effectively constitute municipal policies, I'm also concerned that it could provide a back door around the stringent sort of failure-to-train standard of reckless indifference.

So, for example, a plaintiff in an excessive force case could simply allege that some minor error in the training document constitutes a city policy, and therefore be held to a lower standard than the Supreme Court has held is necessary in a failure-to-train case. It would result in respondeat superior liability, which is exactly what 1983 is designed to prevent in municipal liability context.

I'd also point the Court again to the *Surplus Store* case from the Seventh Circuit. I know there was some talk at the motion to dismiss stage about whether or not this was still good law in the Seventh Circuit, and plaintiffs cited to another case, *Bethesda Lutheran*. I don't think that that case holds the weight that plaintiffs ascribe to it, and in fact there's a later case -- *Frobe* is the name of the case -- it's cited in our briefing -- where a District Court in the Seventh

Circuit has applied the *Surplus Store* logic in almost identical context to a wiretapping statute in Illinois that has since been held unconstitutional.

THE COURT: What's that case?

MR. McGARRY: The case is called if *Frobe v. Village of Lindenhurst*.

THE COURT: And you're saying that is like our case where the circuit said, "No, that's not enough to be custom and practice"?

MR. McGARRY: Yes. It said that the mere enforcement -- the problem that plaintiffs have with this is the enforcement of the state law, not with any city policy, and so therefore it dismissed a 1983 claim against the city.

THE COURT: Whom did it uphold such a claim for?

MR. McGARRY: I'm sorry?

THE COURT: So who was the proper defendant?

MR. McGARRY: I believe that there were county defendants in there as well, and so I don't think that that defense applied to the state or the county defendants in that case. And, again, that parallels what's going on in the instant case.

So on top of all that, finally, and maybe most importantly on this issue, to hold that the City is liable for enforcing every law, every one of the 150 laws in its training book, creates a perverse incentive, right?

THE COURT: It's funny, though, I do admit I have a Supreme Court case that supports you on this, but it's not really liable in the sense of money. It's just a question of liable in the sense of "Don't do this anymore."

MR. McGARRY: But that's true and it's not, your Honor, in the context of attorneys' fees.

THE COURT: Ah-huh. All right, so that's why it matters to you. I see. All right, I get it.

MR. McGARRY: Perhaps I tip my hand.

(Laughter.)

THE COURT: I understand, I understand.

MR. McGARRY: Moving on from our argument that municipalities can't be liable for merely enforcing a state law, again, the policy concerns and the fact that that line of logic would be extended to bring in respondeat superior liability, moving on from that, even under the standard adopted by the Court at the motion to dismiss stage, the *Vives* standard, there's a number of reasons why it's inappropriate here to find for Commissioner Evans that the City adopted a municipal policy with regard to the wiretap statute, enforcing the wiretap statute. And the first and I think the most important reason is that the wiretap training materials are not evidence of any such policy. They were intended to protect the rights of people who were openly recording and to preserve the First Amendment rights established by the First Circuit in

*Glik*. And you can see this on the face of the documents themselves. So there's a Commissioner's memo that rereleased this training bulletin in 2015, and it states that its purpose is to remind all officers that civilians have a First Amendment right "to publicly and openly record officers while in the course of their duties."

There's a Commissioner's memo that rereleased this same training bulletin in 2011, and it explicitly mentions the *Glik* case. There is the training bulletin itself which was released the same year as the *Glik* case, and the wiretap video as well was released that same year.

So this is a case where these particular materials are not evidence of any intention to prosecute people for secretly recording officers. On the contrary, the purpose of these materials is to prevent officers from going out and arresting people who are openly recording. It's to prevent the exact situation that happened to Simon Glik in the *Glik* case. So that's a very different policy.

THE COURT: The thing that I keep coming back to, though, is, the First Circuit did state the right more broadly. So you're right that the factual situation in *Glik* was an open recording, but it did talk about a First Amendment right to record. And then, of course, you do intermediate scrutiny to decide whether or not it was narrowly tailored to protect important interests, which I agree; privacy of citizens is an

important interest.

So apart from the issue about whether the Police Commissioner is properly named as a defendant, I'm just struggling to find out what the privacy interest of a police officer is in a public arrest or a public street stop or that sort of thing, since the only purpose of the statute is privacy. That's the -- and I sort of believe in privacy, I get that, but it's just, as weighed against the First Amendment, it strikes me that in certain settings it just gets counterbalanced.

MR. McGARRY: That's right, but there's a flavor to it, and it's a particular type of privacy, your Honor. It's privacy against secret recording as opposed -- because the statute conveys --

THE COURT: But why should -- all right, fair enough, privacy against -- why should a police officer have privacy against secret recording of a public act? I've been struggling with that. I mean, it's not like you're going into his home and his family or even, you know, bantering in a private cruiser. It's what he's doing in public, or she.

MR. McGARRY: In my opinion, your Honor, the protection, it's the same interest that anyone else has against clandestine recording, right. So in a situation where an officer is openly recorded, that may enhance accountability, but in a situation --

THE COURT: It would decrease accountability because

let's say, for example, he's swearing at someone, they'd stop as soon as the cellphone came out, right?

MR. McGARRY: That's right, and that's exactly the point that I'm trying to make, is that open recording, which is an alternative channel that's left open, is more appropriate for enhancing accountability, where if an officer sees that he's being recorded, he may bring his conduct into line if he was theoretically going to do something wrong. But with secret recording, the goal seems to be a sort of "gotcha" goal, wait until some violation happens.

THE COURT: Sure, because most people -- that's fair, but most people wouldn't feel comfort- -- wouldn't have that cellphone going. In fact, it would be almost dangerous to stick your hand suddenly into your pocket to make it keep going because they'd think it was a gun. So let's say you have somebody who's willing to do that. Most people wouldn't, and so you would perhaps, for the rogue police officer, not the general police officer, might be able to expose the way somebody treats someone.

MR. McGARRY: But when you say most people wouldn't, your Honor, I think that rests on an assumption that the Supreme Judicial Court rejected in *Hyde*. It's an assumption that officers are going to act in some sort of unlawful manner on a regular basis.

THE COURT: Not most officers, of course not, but

some, right? Some.

MR. McGARRY: I don't think that that assumption -- I still think that that's the underlying assumption there, and I don't think that it's necessarily warranted.

THE COURT: All right.

MR. McGARRY: And I think that the privacy interest of a police officer, as far as the wiretap statute goes, is the same as the privacy interest of a particular citizen, which is not to be --

THE COURT: But you could also imagine a situation of private recording where some police officer is a hero.

MR. McGARRY: That's right.

THE COURT: I've seen so many of those in my courtroom; you know, running down the street after someone with a gun, and, you know, you could imagine a positive story that comes out of this too.

MR. McGARRY: Absolutely, and I've had cases where I certainly wish that there was video, but that's sort of a policy rationale rather than -- and a scrutiny rationale. That's --

THE COURT: Well, at some level I've got to weigh. I've got to weigh.

MR. McGARRY: I understand, your Honor, but the legislature has already weighed that, and the Supreme Judicial Court has rejected that sort of assumption as not properly

underlying that statute.

THE COURT: Yes, I understand. All right, thank you.

MR. McGARRY: You're welcome, your Honor. And if I could return to sort of the *Vives* standard --

THE COURT: Oh, all right, and also not liability. Just why don't you finish up on that and then --

MR. McGARRY: Thank you, your Honor. So because the purpose of the training materials at issue was to protect open recording, it's not a conscious choice under *Vives* to enforce the statute against people secretly recording police officers. And plaintiffs make much of the fact that the training materials focus on police officers. I think there's some truth to that characterization, but that's exactly what you would expect if the purpose of those materials was to stop officers from arresting people for openly recording.

The second point under *Vives* is that these training materials are part and parcel of a comprehensive training regimen provided by the Boston Police Department, and *Vives* explicitly makes a distinction between a sort of general policy of enforcing all state laws versus a particular focus on one state law, and these materials fall into the former camp. You know, plaintiffs characterize, well, they only produced 20 something videos and they only made 20 something Commissioner's memos, but there's no basis for saying that those numbers are insufficient. On the contrary, the record shows that making

e-learning videos in particular takes quite a bit of resources. It's been described as making like mini movies. So there are 28 of those out there, and the wiretap video is just one of them.

The third point I'd like to make under *Vives* is that *Vives* distinguishes situations where it's not a conscious choice because it's mandated. Now, I'm not arguing that the state law mandates Commissioner Evans to enforce it, but what I am arguing is that in the wake of *Glik* --

THE COURT: You know, what do you do? Remember back -- there are a bunch of statutes on the book from colonial days, for example. Aren't there all these quaint old statutes they're trying to get rid of? So there's the Commissioner chooses not to enforce whether you can have what, a pigsty in your backyard? You know, some of those old, old cases. So, I mean, there is some choice involved on what statutes you enforce and which ones you don't.

MR. McGARRY: I agree, and, as I said, I'm not arguing that the state statute compels Commissioner Evans to enforce it. That is not the argument I'm making.

THE COURT: What you're saying is, when the state statute empowers him to, the fact that he does does not make it a municipal policy?

MR. McGARRY: Yes, but I'm also saying that federal law in the wake of *Glik* requires training of officers to not

arrest people for openly recording. So the federal law or federal liability comes in as its own sort of mandatory situation here in the place of a state law requiring Commissioner Evans to enforce.

THE COURT: Okay, thank you. I think I've got the point of this, and I've got a lot of people to hear from, so was there one final point you needed to make?

MR. McGARRY: Not at all.

THE COURT: Okay, thank you very much.

MR. McGARRY: Thank you, your Honor.

THE COURT: I think what makes the most sense for us to do is to go to Project Veritas and let the District Attorney sweep up, with an opportunity for rebuttal, if necessary, okay? All right. And, again, you're Mr. Barr, right?

MR. BARR: Yes, your Honor. I'm Benjamin Barr on behalf of Veritas. May it please the Court, thank you for having us here this morning to discuss the matter.

I'd like to take just a moment to discuss the specific importance of this case and the gravity of it in First Amendment jurisprudence before I address three specific areas of our briefings today. We have before the Court Section 99, which is unlike any other recording law in the nation. It is the only law that completely bans secret audio recording. Unlike 38 other states that allow freely to record and 11 other states that have balanced privacy and free speech interests

with reasonable regulations and allow recordings so long as there's no reasonable expectation of privacy, Massachusetts took the radical step to entirely foreclose this important way to be able to gather news and hold government accountable. That creates real tension with the First Amendment, for the underlying purpose of the First Amendment is that those who are in power should be held accountable to those they have power over; and any means that allow them to do so -- to be able to take notes as a reporter, to be able to criticize those in power -- are means that are protected at the highest rung of the hierarchy of the First Amendment.

So if you imagine a reporter in the 1920s having a notepad and listening to a discussion in a public place, it would be implausible to think that it would be constitutional to forbid him from taking notes and later reporting on that. We're in the era today of Alexa and of Syrie and of devices listening to us, and First Amendment jurisprudence has to keep up with technology. Today the reporter's notepad is the ability to do secret recording and to be able to hold those in power accountable, and so it's for that reason that we allege not only as-applied remedies but also overbreadth in this matter.

THE COURT: All right, so you both take slightly different approaches, and it's a difficult doctrinal area. So your claim is I thought facial. I thought that's the way you

brought this.

MR. BARR: We have alleged that it can be determined to be unconstitutional either as applied, in accordance with the facts that we laid out --

THE COURT: As applied to what?

MR. BARR: As applied to the actions that Project Veritas laid out in its complaint and in the statement of material facts, or in its entirety. But I actually think there's a somewhat simple solution to this.

THE COURT: Good. I love it.

MR. BARR: Right, right, yes, I'm here to help, okay. So in essence, it boils down to this: We have the state Supreme Court of Massachusetts already unequivocally declaring that there is no allowance for recording here. That's in plain violation of what the First Circuit has held, the Seventh Circuit, and most Federal District Courts with respect to the right to record under the First Amendment.

In looking at a statute that is before a Federal Court for review, there has to be a reasonable and readily apparent means to construct this to mean something else, to apply a gloss. Now, the state did a great job in pulling up the legislative history behind this. It's unambiguous. There is no waffling about whether this applied all the time or in limited instances or had exceptions or safeguards. It's not a state like Oregon that spells out specific areas where you can

record, public meeting areas, government halls, but then excludes others. It is unequivocal in that ban.

It has had, you know, numerous judicial treatment. The state has not moved to amend it or cure any constitutional deficiencies since *Glik*. There's been no statement from the Attorney General's office that they will not apply it in certain instances. So we're faced with a problem that was created by the Commonwealth of Massachusetts. And while it's an extraordinary remedy, whether you call it overbreadth or whether you look at it as applied, in an as-applied format, I just don't see that there is a way to provide a narrowing construction or a gloss that's readily apparent based on that material. So whether you decide to call it overbreadth or as applied, and scholars from Chemerinsky to numerous Supreme Court Justices have problems with the overbreadth and as-applied situation, it's not --

THE COURT: I'm not the only one struggling with this.

MR. BARR: No, and I do a lot of these pre-enforcement First Amendment challenges, whether they're as applied or --

THE COURT: Has Erwin Chemerinsky written on this?

MR. BARR: I believe he has, if I'm remembering correctly on this. There's numerous scholars who have written about the difficulty of when it's really an overbreadth claim or when it's just --

THE COURT: He's recently written on this?

MR. BARR: I don't believe it's recent. I'd be happy to file some material supplementally afterward.

THE COURT: I've got so much briefing on this. I don't want anymore. I want people to enjoy their summer weekends.

MR. BARR: I understand.

THE COURT: I think he's really smart and thoughtful, and that might help me through this, yes.

MR. BARR: It's my recollection that he wrote on this. I'm hoping I'm remembering the correct author at this moment.

So that's sort of how I see it. The free speech rights of whether it's Black Lives Matter who want to go out and be able to record their interactions with police and other individuals, whether it's Project Veritas, whether it's the ACLU or the like, that's where the paramount importance here is.

THE COURT: But why isn't it -- the way I've been thinking about it is in two buckets. One is individuals. I ruled against you already on that, and I'm not inclined to go the other way. So already I've said that the privacy interests of an individual outweighs that of the press, and that to have a reasonable expectation of privacy, that's in the eyes of the beholder. So you could sit, you know, on the next table over in a restaurant recording and say, "Hey, tough, you didn't have a reasonable expectation. You spoke too loud, so tough." So

individuals I put in a different bucket.

So when you say a facial invalidity, you're talking about government officials in public spaces, or you're talking about something all -- just invalidate the statute?

MR. BARR: Massachusetts chose to write the law so broadly. If you believe there's a narrowing construction that can save it, so be it. I don't see how it can be invalidated piecemeal or in part.

THE COURT: You think -- and I've struggled with this -- it would be too close to rewriting the statute --

MR. BARR: Yes.

THE COURT: -- with something recently the Supreme Court knocked down in an immigration context. So, you know, I worry about that, whether there's an easy narrowing as opposed to me being a legislator. But why wouldn't the easy one be government officials?

MR. BARR: Because Massachusetts had the ability to limit it to private individuals, to protect just the recording of private individuals. There's no indication of that. It's never taken that stance in litigation, and that's not how the state courts have interpreted the law. So it would be a complete reversal of both what --

THE COURT: What about going along with what the ACLU wants, which is just narrowing it to police officers where there's -- you know, they've always been treated a little

differently because of their ability to wield public force.

MR. BARR: Right. Well, I think all agents of government possess the ability to be corrupt or to abuse the rights of individuals, whether they're a city council member who wants to bribe, a tax auditor who's acting improperly. I think it's incredibly narrow to say that this should only apply to police officers. I understand it's the particular facts of the program and respect that. Veritas has alleged in its complaint and its statement of material facts that it wants to investigate a wide array of public officials. And the underlying test is whether the activity in question serves to be able to hold government accountable and to be able to allow individuals and a free people to criticize those in power, and that is what this allows, so every public official imaginable.

Now, you know, we noted in our brief, one remedy might be your formulation in *Martin* that the secret recording of public officials performing their official duties in a public place, something to that effect -- I'm paraphrasing -- might be a reasonable construction, but I have a very difficult time understanding how it would be reasonable and readily apparent that given the legislative history that was a unanimous decision to ban all secret recording and that the state Supreme Court has interpreted as such, I just, I don't see how that --

THE COURT: You think it's all or nothing?

MR. BARR: I do. Now, as a backdrop, we really would

like to be active in Massachusetts before November, four months away. We've got a small time window in which the electorate listens to information about public officials, and it's usually before an election. So if the Court is inclined to, you know, to not as wide a remedy, of course we'll accept that too, but --

THE COURT: You can appeal.

MR. BARR: Yes, your Honor, but time is of the essence here.

I wanted to jump into just briefly ripeness concerns that were raised both by you in the previous dismissal order --

THE COURT: Yes, and I've been worried about this because I keep going back and forth on the as applied versus facial.

MR. BARR: Right.

THE COURT: You're looking for a facial overbreadth challenge, I understand that; but if I went to, as you said, the alternative, as applied, and then I said, "As applied to what?" and you said, "Well, as applied to what we want to do," that's where it gets complex. I know exactly what Martin's people want to do.

MR. BARR: Correct, correct.

THE COURT: And I don't really know exactly what you want to do, and you're not going to tell me because that would ruin the -- I thought I would see something more concrete on

your proposal --

MR. BARR: We changed.

THE COURT: -- the sanctuary cities, and it's shifted.

MR. BARR: What we did was, when we filed our amended complaint, we did provide one very factually rich set of details for one of our projects. We've also bolstered the others --

THE COURT: Sanctuary cities.

MR. BARR: No, not on sanctuary cities. In the amended complaint --

THE COURT: Was that the landlord one?

MR. BARR: No, no. So this is about Antifa and about public protests and police treatment of protesters in free speech rallies.

THE COURT: Oh, I'm sorry, all right.

MR. BARR: No. We have four different main projects that we've alleged. This one, you know, I took care to take your statement in the order of dismissal very seriously that we had not alleged any plans, steps, or past activities that would suggest a present intent to lodge a prohibited investigation. So we're very careful to try to spell that out, both in the complaint and in the materials supporting the statement of material facts. And just to call to the Court's attention what's very different from the prior pleadings, in Paragraph 28 we describe the program in which Veritas has been active with

Antifa organizations for more than a year; that we were present -- we had a past activity. We went to the Charlottesville Unite the Right rally on August 12 where an individual was ran over by a car. We caught that by secretly recording --

THE COURT: Was that you?

MR. BARR: Other journalists as well, but we caught that. We also caught --

THE COURT: I forget, what exactly does Antifa --

MR. BARR: Oh, antifascists. And we caught interactions of police with protesters taunting them, jesting them. We went then to Atlanta, Georgia, on August 13, the next day. We went to the next Antifa protest there.

Now, a week later, August 19 -- this is Paragraph 29 of the complaint -- Boston had the similar free speech alley with Antifa present. We were denied the ability to secretly record. It's not hypothetical.

THE COURT: Did you publicly record?

MR. BARR: No. We sent no one there.

THE COURT: You sent no one?

MR. BARR: Right. We believe there is an intrinsic strength in being able to secretly record individuals in their interactions with government.

THE COURT: So if I did as applied, both of those very concrete examples would be very much a traditional public

forum?

MR. BARR: Yes. So I wanted to address the complexity in recording law. I do all of the recording operations for Veritas nationwide, and there's a difference between a public forum and a public place.

THE COURT: Yes.

MR. BARR: So for purposes of recording analysis, what happens is that, for example, while a restaurant wouldn't be a public forum, it would be deemed a public place, say, in California that has a two-party consent standard. And the reasonable expectation of privacy standard comes out of *Katz* from Fourth Amendment jurisprudence. It's not "eye of the beholder" so much. It's a well-developed line of jurisprudence --

THE COURT: Yes, but, you see, the problem I have with that, relying on tort remedies, is the technology has changed. And as soon as you, let's say, audiotape somebody in a restaurant speaking, and some jury two years from now decides that that person had a reasonable expectation of privacy, that's now all over the Web forever.

MR. BARR: Yes.

THE COURT: So technology both helps and hurts you. It's not like somebody scribbling on a notebook.

MR. BARR: Well, it's the most effective means to be able to record what government is doing, to be able to

publicize that to the public.

THE COURT: But you've got to understand, it's a bigger megaphone.

MR. BARR: It's a bigger megaphone.

THE COURT: And you can't ever, ever get it down.

MR. BARR: Right, and I think your concerns that you're speaking to now speak more to private individuals, which we realize --

THE COURT: Yes, yes, yes.

MR. BARR: That claim is dropped. We're saving that for appeal. But as to government officials, the larger the megaphone, the better the recorder, the better our republic is.

THE COURT: You're just saying that if you take -- so that would be the "as applied" if I went that route --

MR. BARR: Yes, yes, exactly.

THE COURT: -- would be to the public spaces. However, I choose -- and do I sound too much like a legislator? I know that's your big point; like, well, "yes" to the Boston Commons, "no" to the restaurant.

MR. BARR: This is what I'm trying to articulate is, I mean, I suppose you could fashion a test that says on Tuesdays and Thursdays but not Sundays and here --

THE COURT: Right, and that's why ripeness is also both a jurisdictional and prudential concern. Like, I'm reluctant to say, "Yes, well, what about restaurants?" Well,

what about the Historic Commission? Well, what about this? I mean, I find my -- I was, you know, doing this with my law clerks: Well, what about this and what about that? And I found myself sounding like a legislator. Like you say, most legislators have drawn lines. Well, I'm not that person.

MR. BARR: Right. Yes, if I may offer an example too. The right to record in a public space versus a public forum is important because, for example, a police officer could be taking a bribe in a restaurant, in a hotel lobby, areas that most states that have two-party consent law would ordinarily say lack a reasonable expectation of privacy, and you'd be getting good information that you'd be able to pass along to the public. So I think it's important to keep that distinction separate between public fora analysis under the First Amendment and public place. If this Court finds, you know, a way to sensibly narrow the law or limit it, that's terrific, and we'll do the best we can with it.

THE COURT: Or at least for now, and then let other cases arise as issues arise.

MR. BARR: Well, I cited *Citizens United* in my brief to explain that when First Amendment rights are before the court, that length of litigation and denying people that full ability to be able to hold government accountable and speak does great damage to them. It causes financial burdens. It mutes them.

THE COURT: Where they kept trying narrowing, and then they finally threw up their --

MR. BARR: Kept trying and trying, right.

THE COURT: It's easier for them than for me.

MR. BARR: Well, I mean, when you think about this, this law has had several attempts at state court treatment to narrow it or to provide some remedy there that hasn't occurred. The state hasn't responded in any way to *Glik* or any other judicial treatment there. So really the burden has been on Massachusetts to provide some narrowing construction, to provide some remedy, or some notice to public that this is what you're able to do. It has taken no steps. And the burden can't be on us, the speakers. The burden is on the state, not even the Attorney General's office.

THE COURT: But what I'm struggling with is, this is pre-enforcement, how do you do as applied pre-enforcement? Because, by definition, it's not as applied because it's pre-enforcement. So where I have very specific instances of people actually recording with police officers, that's ripe, and maybe your -- how do you pronounce it?

MR. BARR: Antifa.

THE COURT: -- Antifa or the public protests, maybe that would be as applied where it's very concrete for me. It's otherwise more difficult.

All right, well, I think I understand your position,

and I understand -- I didn't know if you had a position one way or another. You're just going against the District Attorney, is that right?

MR. BARR: Yes, I believe declaratory relief is sufficient for our purposes here.

THE COURT: And it would regardless -- because right now, of course, he's only the District Attorney of Suffolk County, so you think that would be sufficient?

MR. BARR: I do, yes.

THE COURT: All right.

MR. BARR: I would just note very briefly on the ripeness that, you know, the statement of material facts, Paragraph 5, and the affidavit of Russell Verney, who's the Executive Director, and Joe Halderman, both Paragraphs 5 and 6 provide the concrete details about the Antifa. We've provided additional details on some of the other plans such as the sanctuary cities, but they're really difficult to narrow down because it's more of a spontaneous organization. We want to be able to deploy people into the state and to be able to start talking to police officers, legislators, members of the Massachusetts Immigration Board and the like, candid conversations in public spaces, and see where that develops. And that is through what we've shown through discovery, that's the manner in which Veritas operates. So if that's too speculative, we did our very best on Antifa to give you a very

concrete plan to show you. We did it before. We show you exactly what equipment we use, why we want to do this particular type of recording, and why we think that's important. And I think that meets your ripeness standard that was detailed in the previous order.

THE COURT: Right, I'd like to think it was mine. I think I took it right out of the First Circuit case. So I think that's what they're going to ask for as well, so --

MR. BARR: Yes. And it also meets *Alvarez*. You know, *Alvarez* had a base and you had a plan to do a police accountability project and to satisfy standing and ripeness concerns there. It was simply enough to develop a plan to generally record police in public spaces. They couldn't know the exact people or the exact time, where, et cetera, but a general plan, so that's why I think some of the others would also satisfy.

But I want to just remind this Court in closing about the radical and unprecedented nature of this. As I noted, so many states have taken careful measure to balance both the First Amendment and privacy interests. Only Massachusetts decided to forgo that balancing, and it deeply injured the First Amendment in doing so. On top of that, and to support overbreadth and the seriousness, the gravity of the situation, it imposes a five-year criminal penalty. So if you're a social protester, if you're active with Black Lives Matter and you

step across that line because you're catching something that the public needs to see, off to jail for five years. In Massachusetts, we're going to imprison journalists; we're going to imprison the civic-minded. America does better than that.

Thank you, your Honor.

THE COURT: Thank you.

MR. HASKELL: Good morning, your Honor.

THE COURT: Now the last word.

MR. HASKELL: Speaking for DA Conley on both cases, if it's okay with the Court, what I'd like to do is make the argument which I think I mentioned earlier.

THE COURT: Penultimate word because I am going to give the opportunity for response.

MR. HASKELL: Second-to-last word, still batting cleanup here. What I'd like to do, if it works for the Court, is make our argument and kind of note along the way where the argument might be different with respect to the two cases, but, as I mentioned, the argument is fundamentally similar for both Martin and Project Veritas, if that works.

So, you know, I think the Court is starting in just the right place speaking about the as-applied versus facial distinction as well as the remedy, and I think those two are inextricably linked to one another. We know that from the Supreme Court. We know that from the John Doe No. 1 case, which says that labels don't matter for an as-applied versus

facial distinction. What does matter is the scope of the relief that the plaintiff is seeking. If you have a plaintiff who's seeking relief with respect to their own circumstances, that's an as-applied challenge. If you have a plaintiff who's seeking relief that goes beyond their own circumstances, that's a facial challenge. You know, sometimes we think about a facial challenge as a challenge to the entire statute and every possible application of it, but there's something in between, and that's actually exactly what the Supreme Court faced in John Doe No. 1. You know, I've come to describe it as a partial facial challenge; that is, a challenge to the statute that goes beyond just its application to plaintiffs but doesn't go all the way.

THE COURT: Yes, that's maybe what Ms. Rossman has been calling the quasi --

MR. HASKELL: I think that's the same thing.

THE COURT: Yes.

MR. HASKELL: And what the Supreme Court says in John Doe No. 1 is, if you're making one of these quasi facial challenges or these partial facial --

THE COURT: It goes beyond you but not to the full statute.

MR. HASKELL: That's right, that's right. What the plaintiff needs to do is meet the standards of a facial challenge to the extent of the scope of the relief that they

seek, and that makes sense. Where the plaintiff is looking to invalidate a statute in circumstances beyond their own, it's up to them to prove that the statute isn't validly applied in all of those circumstances that they're seeking relief for. And that's why the takeaway from John Doe No. 1 that the First Circuit picks up and applies cleanly in the *Showtime* case is, when a plaintiff is making a facial challenge, including one of these quasi or partial facial challenges, their burden is to show that the statute lacks a plainly legitimate sweep within the scope of the injunction they're looking for. And that's actually a little bit relaxed in the First Amendment context. In other constitutional claims, you'd apply the *Salerno* standard, that there's no set of circumstances. What they need to show here, and this goes for both the Martin plaintiffs and Project Veritas, where the relief they're looking for is an injunction this wide, they have to show that the Section 99 lacks a plainly legitimate sweep within that scope of the injunction that they're looking for. How do they do that? They apply the appropriate level of constitutional scrutiny. That's where intermediate or *Swift* or the *O'Brien* standard or whatever the appropriate level of scrutiny is comes in, but that's what they need to show, and it's their burden.

THE COURT: I think I've pretty much put my blessing on an intermediate scrutiny standard.

MR. HASKELL: Well, here's the -- sure.

THE COURT: I mean, I haven't really budged off of that because it's content-neutral.

MR. HASKELL: Well, that's right, but the thing about intermediate scrutiny that the Supreme Court reinforced just recently, just last month in the *Minnesota Voters v. Mansky* case that they passed down about wearing political apparel within poling places, what the Supreme Court reinforced is that intermediate scrutiny is a creature of the Supreme Court's forum doctrine when the government says, "We're going to put a time, place, manner restriction on speech that happens here in this particular forum." And what's tricky about the claims in this case is, they aren't limited to a particular forum. They extend to all public places. Some of those public places are going to be governmental forums where, yes, absolutely, intermediate scrutiny applies. Some of those are going to be governmentally owned nonpublic forums where a time, place, manner restriction passes constitutional scrutiny as long as it's reasonable and not designed to suppress a particular viewpoint. Some of the places that we're looking to apply it are private property where, you know, the government forum analysis doesn't really apply and --

THE COURT: A fair point. So let's assume for the moment that we're talking about traditional public fora.

MR. HASKELL: Sure.

THE COURT: So using intermediate scrutiny, what could

possibly be the privacy interests that would outweigh the First Amendment interest?

MR. HASKELL: Sure. So the privacy interest is actually exactly what Mr. McGarry spoke to earlier, and that is a particular flavor of privacy; not privacy in the sense that you can't record me, but rather privacy in the sense that you have to let me know when you're recording me so I can make an informed choice about --

THE COURT: So I can keep quiet and stop swearing.

MR. HASKELL: Or you can choose to speak, by the same token.

THE COURT: Or -- or you could just be -- you know, you just suddenly conform, and you wouldn't be able to record somebody who -- or you wouldn't take a bribe or whatever. You would stop doing what you were now embarrassed about, which in a way, you're right, it forces conformity to the law or to civility, however you'd like to go, but you wouldn't change the dialogue, the public dialogue.

MR. HASKELL: Well, that's right. It's an ecumenical interest in this kind of privacy in the sense of you have to let me know when you're recording me, but that's a policy judgment that Massachusetts legislature was within its rights and not acting contrary to the First Amendment.

THE COURT: But that's in fact what I'm struggling with.

MR. HASKELL: Sure. So, I mean, it is an ecumenical interest in the sense that, you know, the legislature's purpose -- it's clear from the language of the statute in the preamble, it's clear from the William Holman's concurrence in the 1968 legislative history report -- their interest applied equally to everybody in all places. You know, they weren't drawing any lines there and saying that some people get --

THE COURT: Do they talk about police officers?

MR. HASKELL: They don't talk about police officers.

THE COURT: Do they talk about government --

MR. HASKELL: They don't talk about anybody specifically.

THE COURT: And when you read it, it talks about citizens' privacy rights, like a Brandeis kind of concern about -- that's great. I'm just saying, what Justice Cordy and Justice Marshall said in *Hyde*, and I respect them both enormously, was, yes, but they weren't talking about police officers. And so I suppose the SJC said, yes, they were, and that's the final word on it; but I'm the final word, or more accurately the Supreme Court is the final word on whether or not whatever the privacy interests are outweigh the First Amendment issues.

MR. HASKELL: Well, I think that's right, your Honor, and I guess my point is, Massachusetts statute, Section 99, is -- it is broad, and it's categorical and it's clean, and the

interest that the legislature has expressed there, that people ought to know when they're being recorded, is within the realm of legitimate policy judgments that the legislature can make because maybe there are going to be some situations where it causes bad activity to go undetected. There are going to be other situations where it helps good activity to go detected. There are going to be other situations where it prevents bad activity from happening in the first place, and that's a good thing. That's something that the legislature could legitimately have wanted to do was use the possibility of open recording to deter bad acts rather than using surreptitious recording to catch them.

THE COURT: Because one could imagine citizens recording a police officer showing heroism in some of these locations too, but it would involve speech. That person could go to jail for five years too, right?

MR. HASKELL: It goes all ways. It's an ecumenical interest.

THE COURT: When you say "ecumenical," you mean --

MR. HASKELL: Broad.

THE COURT: Broad.

MR. HASKELL: Without special exceptions I guess is what I mean.

THE COURT: So it's just very hard for me to understand a strong privacy interest. And so for me the big

issue is, the one that I've been struggling with is, if you do it just as applied, you could potentially just deal with police officers, the narrowest would be in public fora. If you did it a little broader, it would be all public officials in public fora. If you did it a little more broadly, it could be in a publicly accessible setting like a restaurant, and then I start feeling like a legislator. So I'm struggling with, do I just take the strongest case, or do I keep expanding?

MR. HASKELL: Well --

THE COURT: And --

MR. HASKELL: Go ahead.

THE COURT: I'm struggling with that, where the Supreme Court always is admonishing us, you know, if there's something that's easily available to narrow it, take it, but otherwise don't rewrite a statute.

MR. HASKELL: Well, I think that's right, your Honor, and where we come from on that is, we take those same concerns and frame them in terms of ripeness. You know, this application of the First Amendment right to record in the context of Section 99 and whether the two are going to conflict somewhere is going to depend on the circumstances. That's the lesson that we get from all these right-to-record cases.

THE COURT: I get you, and that's normally the case. It's just, in the First Amendment area, you're allowed to do pre-enforcement, and you've got to think about ripeness in

terms of pre-enforcement. That's the catch here. That's why normally I'm totally with you on ripeness, but if I said, no, it's got to be ripe and you've actually got to have a case, then some guy is sitting in jail.

MR. HASKELL: Well, I think the key case on that, your Honor, is *Babbitt*, the Supreme Court case from the late 1970s, early 1980s. It's cited in our brief. It involved an Arizona statute that governed agricultural labor relations, and unions brought a number of First-Amendment-related challenges to that statute, some of which the Supreme Court deemed justiciable, some of which the Supreme Court deemed non-justiciable. And the way the Supreme Court made that distinction was, well, what are the legal principles that are going to resolve these cases?

The claim in *Babbitt* that the Supreme Court found justiciable, there are two of them actually. One had to do with the procedures for electing union representatives among agricultural workers, and what the Supreme Court said there is, you know, "We can decide this claim based on broad legal principles, so the facts don't matter as much, and we're going to decide it." And they actually throw that claim out. They say, you know, "There is no First Amendment interest in the way you elect your union representatives, so that claim is thrown out."

In contrast, another aspect of that statute had to do with agricultural employers giving union representatives access

in their facilities. You know, "Come onto our farm. Come onto our workspace. You can set up a table. You can handbill, whatever, to try to recruit members." And, you know, the unions in that case tried to get that thrown out as well, and the Supreme Court said, "Well, no, that is fact-dependent. Whether the union has a First Amendment right to seek to associate with workers there is going to depend on the specific site where they try to do it. You know, some farms are going to be different from others, and it's really going to depend on the facts. We can't resolve it on a broad principle, and therefore it's not ripe, it's not justiciable."

Our position is that a claim of this type, where does somebody have a right to record under the First Amendment, really depends on the circumstances. It depends on who they're recording. It depends on where they're recording.

THE COURT: Is it a jurisdictional matter or prudential matter?

MR. HASKELL: That is jurisdictional. My position is that it's jurisdictional.

THE COURT: Because both considerations can come in on a ripeness.

MR. HASKELL: Well, that's right, and, you know --

THE COURT: But, you know, what else -- I mean, in fairness, let's just talk about the Martin plaintiffs -- what else do they have to do at this point, actually get themselves

arrested? They say, "We record police officers in public settings, and we've done it twelve times, and we wanted to do it in twelve other times." What else?

MR. HASKELL: Well, and it's that "We wanted to do it twelve other times" --

THE COURT: "And we didn't." They've been chilled.

MR. HASKELL: I don't think that's something that we're disputing. Our contention on jurisdiction isn't that they haven't been injured by a chill. It's more that, you know, give us some facts that the Court can apply the law to. In a pre-enforcement context, of course you aren't going to have a record of historical fact because it didn't happen yet, but what the law says a plaintiff needs to do in a pre-enforcement context is: Tell us your intentions. Tell us your plans. Give us that level of detail necessary --

THE COURT: I completely agree, and that's what now Project Veritas has done, because I threw it out at least once, maybe twice -- I can't remember -- and then they finally came back with something. I thought, all right, it gets to at least stage two. So haven't they done that?

Can I just say -- you've seen their videos, right? Everyone knows who they are, right? Is there any doubt in your mind that they're going to try and do this kind of "gotcha" in Massachusetts if they can?

MR. HASKELL: No.

THE COURT: Okay, all right, so we know they want to do this, right? There's like a hundred percent beyond any doubt, not even beyond a reasonable doubt, beyond any doubt they want to do it here.

MR. HASKELL: No doubt, but --

THE COURT: All right, no doubt, okay, so --

MR. HASKELL: But the details are where the devil lives here.

THE COURT: Yes, they are, and so that's why I think they very cleverly just say "Just do it all." I'm just having trouble with the "do it all" because I feel so strongly about individual rights, that the legislature had a right to say that they counterbalance, or at least I wasn't going to override that; but I'm just having a hard time with the privacy rights of, say, police officers in the public setting.

MR. HASKELL: And that's a big source of our concern about Martin's claim as well. They don't limit their claim based on who the officer is talking to or what the nature of that interaction is.

THE COURT: They can't because it's pre-enforcement. They can't.

MR. HASKELL: And I guess where we're coming from on ripeness is, that might make a difference. You know, a situation where a police officer is arresting somebody out in public, that's one thing. The parties' interests are what they

are there. You know, a bystander is recording them --

THE COURT: That's the only time I'll get the level of detail is once they're behind bars. That's the difficult thing here, and I'm struggling here with this. I think they're fabulous cases. I'm very honored to be allowed to preside over cases like this because they're so interesting and important, but I am -- this may be a case -- don't you get to argue your own cases in the Supreme Court?

(Laughter.)

MR. HASKELL: I'm afraid I'd have to talk to my boss about that.

THE COURT: In the Attorney General's Office, I think that's one of the beauties of it, you get to take it up. But it's just a very interesting case and one that merits great public attention.

I actually have an 11:00 clock, so I think I'm going to need a few minutes, if you have one final comment, and I'll allow a brief rebuttal from both the ACLU and Project Veritas, if they want. I certainly have enough briefing, so --

MR. HASKELL: I mean, just to wrap up the jurisdictional thing, what it comes down to for us is, is the risk that the Court is going to find itself dealing in hypotheticals and drawing these hypothetical lines without really a solid basis in the record, without facts or even any plaintiff's plans or intentions, "This is what we plan to do, how we plan to do it

and where we plan to do it." And without that, we're just dealing in hypotheticals, and we see that as an Article III problem.

THE COURT: Or maybe just a prudential issue. I think I'm allowed to think about that.

MR. HASKELL: And so we have a separate line of argument, if I could end with two things.

THE COURT: Yes.

MR. HASKELL: First of all, Mr. Barr argued a moment ago that Massachusetts is an outlier on this. It's not. I think it's fair to characterize Massachusetts as, you know, representing one end of the spectrum. When it comes to balancing recording versus individual privacy rights, Massachusetts is very protective of privacy rights. But we're not the only one out there, and I'd point the Court to Oregon Revised Statutes 165.540. What Oregon has is a general all-party consent requirement, unless the person doing the recording specifically informs the people that they're being recorded. However, there's a statutory carve-out for police officers in public meetings. The catch to the statutory carve-out --

THE COURT: In public meetings?

MR. HASKELL: Public meetings.

THE COURT: Police officers in a public meeting?

MR. HASKELL: And a public meeting.

THE COURT: And, and, and --

MR. HASKELL: Two separate statutes.

THE COURT: Oh, oh, I'm sorry.

MR. HASKELL: Police officers doing their duties in public, very similar to the scope of Martin's claim, and public meetings. The catch to those two statutory carve-outs, though, is that they only permit open recording, not surreptitious recording. Oregon says, generally you can't record without all parties' consent or without them being specifically informed, but you can record police officers doing their stuff in public as long as you do it openly. It's the exact same policy.

THE COURT: So you're saying it's the same thing in Oregon?

MR. HASKELL: Fundamentally when it comes to police officers.

THE COURT: Fundamentally.

MR. HASKELL: And, you know, an interesting thing about --

THE COURT: So what's the bi-coastal approach.

MR. HASKELL: That's right. And the really remarkable thing about Oregon is, their all-party-consent requirement has been on the books for a long time. This police "you can openly record them in a public" carveout was just enacted by their legislature a couple years ago, and, you know, it seems pretty clear that it's in response to recent developments --

THE COURT: Is there litigation in Oregon? Do you know?

MR. HASKELL: There hasn't been, or at least as best I can tell on Westlaw. I haven't picked it up, so nothing has been reported yet. But, you know, it goes to show --

THE COURT: They're getting on a plane as soon as they leave this --

MR. HASKELL: I bet they are, but that's not my case. But, you know, it goes to show that this notion that a policymaker can legitimately make a distinction between open recording where the people know about it and surreptitious recording where they have no idea that they're even being recorded and can do anything about it, and, you know, they become an unwilling object of this recording, that distinction continues to hold some force in public policy-making, at least among the legislature of Oregon.

THE COURT: Okay.

MR. HASKELL: So unless your Honor has any questions --

THE COURT: No, thank you, and I'm just going to give -- it's ten of, and I'll need to give my Court Reporter a break before the next hearing, so I thought if each of you took five minutes, does that seem fair?

MS. ROSSMAN: Absolutely, your Honor. Thank you.

Three quick substantive points, your Honor, and I

actually have one procedural question. I know for the purposes of the Martin case, our replies are actually due on Monday, but we have now heard the Court say multiple times, I know that you have a lot of papers already at this point, so we would propose modifying the order to eliminate those briefs unless this Court has specific issues that you would like to hear further about --

THE COURT: You know, between the motions to dismiss briefing and the fact that there are two sets of briefing, I'm not going to prevent you from filing a reply, but I don't need one.

MS. ROSSMAN: Thank you, your Honor.

THE COURT: Thank you.

MS. ROSSMAN: So with respect to the three quick substantive issues, the first two I think can both be addressed by *Glik* already. So to this point that you've already raised several times about the interest of police privacy and are there any, as this Court already had stated before, there are not, and I think that's supported by the First Circuit. The First Circuit has spoken to this in *Glik* when it said that there could be no reasonable regulation of a police officer arresting someone in public. I think that's acknowledging and holding that there is a right to record police officers while they're performing their duties in public. The First Circuit has already answered this, that there are not privacy interests

of the police officers involved.

And, similarly, I think a critical distinction, and this arose in Defendant Conley's brief, and I know Mr. Haskell just raised this here today about whether the right to record exists if that turns on context; and I think there's a distinction between the right to record police officers performing their duties in public and whether a regulation of that right can be reasonable. And that first category, *Glik* has already said quite clearly that the right to record police officers performing their duties in public is covered by the First Amendment, period, and there's no additional context that's needed there. Now, whether a regulation --

THE COURT: I think they said it more broadly. They said "government officials," didn't they?

MS. ROSSMAN: Yes, your Honor.

Now, with respect to the regulation of that right, that might turn on circumstances depending on the particular regulation, but, of course, here Section 99 does not take into account any details. So for that reason, the details are unimportant with respect to the regulation, but the right exists when you're recording a police officer performing their duties in public, regardless of additional context.

The final point goes to remedy, and I just want to be very clear. The plaintiffs, as we noted, are seeking that declaration that Section 99 is unconstitutional as applied to

the secret recording of police officers performing their duties in public. And with due respect to Mr. Barr, I don't think that this needs to be an all-or-nothing question. There certainly is a doctrine of narrowing the construction when a court is doing statutory interpretation and trying to avoid a constitutional issue and interpreting a statute, but that's not what the claims are here. Here the plaintiffs are saying that the statute says it's unlawful to secretly record police officers performing their duties in public, no doubt about it, but that application is unconstitutional, and this Court certainly has the power to say that that particular application fails the First Amendment.

And what we're asking for in this relief is, at the very least, this means that Section 99 cannot be applied to secretly recording a police officer's voice when they're performing their duties in public. So that means that it couldn't be used to charge someone when they secretly record a police officer in a one-on-one interaction, or when somebody else was in -- anyone else was with him already knew about or had consented to that recording. And plaintiffs are certainly asking for that relief here, but they're also asking for something a bit broader, and that is, when someone secretly records a police officer performing their duties in public, they can't be charged under Section 99 for that recording, even if that recording includes other individuals' voices. And *Glik*

speaks to that, your Honor, where it already said that there's no reasonable regulation of a peaceful recording of a police officer performing an arrest in public. So that is what the plaintiffs are asking for here today.

THE COURT: So would you view it as part of your obligation to delete out the bystanders?

MS. ROSSMAN: Your Honor, I believe that's the type of -- as it's written right now, the government has not established that there is any -- that the statute as it is written is narrowly tailored to any significant government interest, and for that --

THE COURT: Let's say you were to record a government interaction, a police interaction with civilians, there is a question about the civilian's rights to privacy.

MS. ROSSMAN: First of all --

THE COURT: I don't know that I have to deal with that specifically, but I would imagine that if you were audio recording some civilian conversation that you happen to pick up, the statute might fairly apply to that. You're not even asking me to say anything else, are you?

MS. ROSSMAN: We're speaking to those interactions with police officers, your Honor, and if there is some narrow tailoring that needs to occur here to address additional interests, it is appropriate for the legislature. Of course, as you mentioned multiple times yourself, is that the

legislature can do that narrow tailoring if there are any significant government interests. But the problem here is that as applied to the secret recording of police officers performing their duties in public, there is just no tailoring for any particular circumstances that the government has been able to put forward where there's significant government interest, and that's the application that the plaintiffs are asking the Court to strike down as unconstitutional.

THE COURT: All right, thank you.

Mr. Barr?

MR. BARR: Thank you, your Honor. To address Mr. Haskell's point, because I've done several proof-ins for Oregon, there are numerous exceptions built into the law that allow at least for the ability to record. When notice has been given that a recording is occurring at an educational activity, for example, it's unclear whether it has to be open or surreptitious, so there's questions about the exact reach of Oregon law that haven't been settled in any meaningful litigation, but at least seems to be more expansive than Massachusetts. Massachusetts is an outlier. It is the only state with a complete ban --

THE COURT: What about police officers in Oregon?

MR. BARR: What about police officers?

THE COURT: I thought he said that it had to be --

MR. BARR: Oh, I believe it's open for them as well.

THE COURT: It has to be open.

MR. BARR: Yes, yes.

THE COURT: So he's right on that point?

MR. BARR: On that point, yes, yes. But my point is to say there are other exceptions that, for example, allow the recording of private individuals --

THE COURT: You don't have to win that it's the worst in the country either.

MR. BARR: Yeah, okay. All right, I got you. In addressing sort of the need to have a proper fit here and address the exact circumstances, the when, where, how, why that the Attorney General's office has cited, that would be fine if we had a law that had difficult-to-interpret terms and we had a factual situation that we had to plug into that and figure out; but you have to measure the case before you against the law, the actual law. We don't have a hypothetical law such as one that you find in California or in New Hampshire or the like. We have a complete ban, so it is impossible to do that sort of precise fit here, and it's unnecessary.

I'd like to thank the Attorney General's Office that this is ripe, and there's no question beyond a reasonable doubt that Veritas will film if relief is afforded here.

I wanted to speak quickly to the remedy aspect of this. You know, if entire invalidation seems appropriate, the Massachusetts --

THE COURT: When you say entire invalidation, you're referring just to government officials?

MR. BARR: Yes, just -- well --

THE COURT: I know you're appealing the other piece of it, but as you're standing here today with what's left --

MR. BARR: Well, right, but to issue --

THE COURT: -- you want me to revisit it?

MR. BARR: To issue an order stating that Section 99 is unconstitutional but only as to the recording -- I'm sorry -- only as to the recording of government officials doing their duties in a public place, that that's a gloss, that's a narrowing construction that you're applying to the statute; and the controlling Supreme Court precedent asks, is that reasonable and is it readily apparent? And I appreciate that you have concerns that if you invalidate it in its entirety and in toto, that private individuals' privacy concerns will be damaged; but the Massachusetts legislative branch can take actions to quickly move and to put in place a law where you can be creative in a remedy to give them time to do that on that angle. But in the meantime, November is four months away. It's very important for Veritas to be able to come in, be able to realize its projects, to be able to speak to people when they want to hear about this news most. They'd prefer not to go to jail and be imprisoned for five years.

Thank you, your Honor.

THE COURT: Thank you. Thank you to everyone. I have two scheduling conferences at 11:00 o'clock. Those aren't on the record. We can stand in recess briefly, and then we'll call you right up here. Okay, thank you.

MR. HASKELL: Thank you, your Honor.

THE COURT: Thank you very much.

MR. McGARRY: Thank you, your Honor.

(Adjourned, 11:00 a.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT )
DISTRICT OF MASSACHUSETTS ) ss.
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 78 inclusive, was recorded by me stenographically at the time and place aforesaid in Civil Action No. 16-10462-PBS, Project Veritas Action Fund v. Daniel F. Conley, and Civil Action No. 16-11362-PBS, K. Eric Martin v. William B. Evans, et al, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated this 1st day of April, 2019.

/s/ Lee A. Marzilli
_____
LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER